> Tax.—In addition to the tax imposed in the preceding sections, every motor vehicle carrier operating on the public highways of the state and every railroad corporation, railroad car corporation, express corporation or company, pipe line corporation, telephone and telegraph corporation, airline corporation or company, and operator of a steamboat or other watercraft, for the transportation of passengers or freight, doing business in this state shall pay an annual privilege tax for each calendar year for the privilege of doing business in the state, to be determined as follows:
>
> . . .
>
> (b) The tax as to railroad corporations shall be equal to four per cent of the net income earned within the State, such income to be determined by ascertaining a sum bearing the proportion to total net income of the corporation that its business done in West Virginia, measured in ton-miles, bears to all business done, measured in like fashion . . . .[2]

This tax is imposed on net income from intrastate and interstate commerce, apportioned to West Virginia on the basis of ton-miles of freight carried. The Supreme Court of Appeals of West Virginia held this tax invalid as applied to respondent's net income from interstate commerce for the years 1952 through 1954.

STATEMENT

The Baltimore & Ohio Railroad Company (hereafter referred to as "the B&O" or "respondent") is a Class I Railroad Company, operating under authority of the Interstate Commerce Commission, and engaged in the transportation of passengers and freight

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[2] Other subsections of section 5 prescribe differing rates of tax on net income for various types of carriers.

in twelve states, including West Virginia, and in the District of Columbia. Its operations extend from New York City and Philadelphia in the east to Chicago and St. Louis in the west, and from Rochester, Buffalo, Cleveland, Toledo and Detroit in the north to Charleston, Huntington, Louisville and Cincinnati in the south. Its principal offices are in Baltimore, Maryland.

Respondent does both intrastate and interstate business in West Virginia, but the amount of intrastate business in West Virginia is very small. During the years in question, 1952 through 1954, respondent's intrastate freight traffic in West Virginia, measured in ton-miles, constituted less than four-tenths of one per cent of its total traffic (.369355% in 1952, .363753% in 1953, and .370418% in 1954), whereas respondent's interstate freight traffic in West Virginia, measured in ton-miles, constituted well over a quarter of respondent's total traffic (27.01127% in 1952, 26.771202% in 1953, and 27.570283% in 1954). See App. B, pp. 48-49.[3] The State did not even attempt to support the tax by showing that it was levied upon, or measured the value of, any local activity other than respondent's relatively insignificant intrastate transportation activity. The court below found the tax applied only to the "transportation business and does not refer to or include income derived from any other source" (App. A, p. 28).

This case arose out of respondent's claim for refund of overpaid Additional Privilege Tax for the years 1952 through 1954. Following denial of the respond-

[3] The interstate percentages are calculated by subtracting the intrastate percentages from the combination figures set forth in App. B, pp. 48-49.

ent's claim for refund by the State Tax Commissioner, respondent notified the Commissioner of its dissatisfaction with the Commissioner's ruling (App. A, p. 4), and a suit for declaratory judgment to determine whether the respondent was entitled to a refund was brought by the Commissioner in accordance with West Virginia practice (Code 11-1-2a).

In the courts below the B&O claimed that the statute as applied violated the commerce clause of the United States Constitution and that on this ground it was entitled to the full refund claimed, $339,332.51. Alternatively, the B&O claimed that the Commissioner had erroneously applied the tax to all of respondent's net income, including dividends, interest and capital gains, although it was intended as a tax on transportation income alone, and that on this ground respondent was entitled to a refund of at least $314,872.37 (App. A, p. 8). As a third alternative, respondent claimed that under the terms of the statute the Commissioner erroneously failed to allow a credit for dividends received in computing net income to be taxed, and that on this ground respondent was entitled to a refund of $187,460.13 (App. B, pp. 45, 46).

Unanimously, the West Virginia Supreme Court of Appeals held that the Additional Privilege Tax as applied to respondent's interstate activities constituted a tax directly on the privilege of engaging in interstate commerce and an unlawful burden on such commerce. It also ruled in favor of the respondent upon the nonfederal statutory interpretation issues not involved here.

ARGUMENT

This is factually a simple case and presents a question of law which has been many times decided by this Court.

The highest court of the State has held that the tax in question was intended to be and is a tax on the privilege of engaging in the interstate as well as the intrastate transportation business in West Virginia, levied solely on the income from respondent's transportation activities within the State. The income taxed in each of the three years involved was more than twenty-seven per cent of respondent's total transportation income, whereas less than four-tenths of one per cent of its total transportation income represents intrastate traffic in West Virginia. There is no argument, and no ground for argument, that there are activities local to West Virginia, upon which the tax could be based, even if the State court had not held that the tax was only on transportation.

The tax is not in lieu of other taxes (*cf. Railway Express Agency* v. *Virginia,* 358 U.S. 434 (1959)). Contrary to the implications of the petition, the decision of the court below will not result in failure of the B&O to pay its way in West Virginia. The respondent bears and, in spite of the decision in this case, will continue to bear a very substantial tax burden in West Virginia. The decision of the court below does not involve West Virginia's Primary Privilege Tax on railroads; it does not affect respondent's liability for ordinary property taxes in the State; it does not affect the right of West Virginia to continue to impose the Additional Privilege Tax on respondent's intrastate transportation business, and respondent, of course, concedes its liability for such tax.

For the years 1952, 1953, and 1954, under Code 11-12A-2, the uncontested Primary Privilege Tax, respondent paid privilege taxes totaling $1,339,718.45, based upon assessed property value. In addition, for the same period respondent paid property and other taxes, which are not contested, totaling $4,429,722.87.

For the same period, under the statute at issue, respondent paid Additional Privilege Taxes of $795,708.33, of which, under the holding of the court below, $314,872.37[4] was erroneously collected on non-transportation income. Respondent's refund claim was understated; but even if the entire Additional Privilege Tax on transportation income ($480,835.96) including the tax applicable to respondent's intrastate transportation activity had been claimed and invalidated by the court below, respondent's total tax payments to the State for the three years in question would have been reduced by less than eight per cent. Thus, any suggestion that as a result of the decision below the B&O will not bear a substantial share of the tax burden in West Virginia is baseless.

The West Virginia Supreme Court of Appeals did not hold the Additional Privilege Tax invalid *per se,* but rather found it to impose an unlawful burden upon interstate commerce under the particular facts of this case:

> As the privilege tax imposed by Section 5(b) of the statute is a tax upon the net income or receipts from the interstate business of the defendant railroad company in this State and as such results in a substantial and unreasonable burden on its inter-

[4] Respondent's basic refund claim was predicated upon an interpretation of the statute which the court below held correct. The propriety of that interpretation does not involve a Federal question and has not been presented to this Court.

> state commerce *because of the considerable disparity between its much smaller intrastate commerce in this State, which constitutes only approximately .0033 per cent of the entire commerce of its system, and the much greater interstate commerce of the defendant in this State, which is approximately 27 per cent, or more than one-fourth of its total overall interstate business,* such tax is constitutionally invalid *and to the extent that the statute imposes such tax on the interstate commerce of the defendant* the statute is null and void as violative of the Commerce clause, Article 1, Section 8, of the Constitution of the United States. [App. A, p. 26][5]

See also Appendix A, page 27 and Syllabus, points 3 and 4 (App. A, p. 3).

The court below has clearly understood and correctly applied the decisions of this Court.

The basic proposition in all of this Court's decisions involving state privilege taxes on interstate commerce is that the privilege of engaging in interstate commerce is not granted by states but is constitutionally guaranteed. This is one of the "firm peaks of decision which remain unquestioned." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 458 (1959). Therefore, the privilege of engaging in interstate commerce is not *per se* taxable by a state. As this Court said recently in *General Motors Corp.* v. *Washington,* 377 U.S. 436, 446 (1964):

> "[I]t is beyond dispute," as we said in *Northwestern States Portland Cement Co.* v. *Minnesota* . . . "that a State may not lay a tax on the 'privilege' of engaging in interstate commerce."

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[5] Emphasis is supplied throughout unless otherwise indicated. The figure given by the court for intrastate commerce should be .33 per cent, rather than .0033 per cent.

A tax on that privilege is precisely what the West Virginia Supreme Court of Appeals found was imposed by the statute involved here, as applied to the respondent. The tax is on the privilege of engaging in the transportation business and is applied to the income of that business alone, without distinguishing between the intrastate activity on which a privilege tax can be imposed and the interstate activity on which no privilege tax can be exacted.

This Court has sustained privilege taxes imposed on intrastate and interstate receipts only where there were local business activities within the state to which the taxes were fairly related. As the Court stated in the *General Motors* case, *supra* at 441:

> Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, *i.e.*, the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. . . . "[t]he simple but controlling question is whether the state has given anything for which it can ask return."

But there is no basis, either under the statute or the facts of this case, for the argument that the tax rests on any local activity. The only local activity is respondent's relatively inconsequential intrastate transportation, which is separable and measurable. Consequently, the Supreme Court of Appeals of West Virginia held that the decisions of this Court upholding state privilege taxes upon an interstate enterprise because of local activity were inapplicable to the present case.

The West Virginia Supreme Court of Appeals recognized that "there are 'sufficient modes' in which the

local business may be taxed" without taxing interstate operations, and correctly held that a tax on twenty-seven per cent of rspondent's net income, when only a fraction of one per cent was attributable to respondent's separable local activity, clearly was not within the rules established by the many decisions of this Court. West Virginia having imposed conventional property taxes on respondent's property in West Virginia, having levied a separate privilege tax based on its property, and being confirmed by the court below in its right to impose an Additional Privilege Tax on respondent's separable income from intrastate commerce, has nothing upon which it can base application of the Additional Privilege Tax to net income from interstate transportation.

The petition nowhere cites, discusses or distinguishes the cases decided by this Court which were followed by the court below and which confirm the correctness of its decision. In *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U.S. 465, 470 (1931), this Court said:

> And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, *the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business.*

See also *Cooney* v. *Mountain States Tel. & Tel. Co.*, 294 U.S. 384, 393 (1935); and *Sprout* v. *South Bend*, 277 U.S. 163, 171 (1928), for similar holdings with supporting authorities.

The court below carefully analyzed the operating incidence of the tax in question and found that it did not satisfy any of the requirements specified in the foregoing cases:

> On the contrary the privilege tax created by that section [5(b)] is imposed on interstate business within the State and not solely on intrastate business; the amount of the tax is substantially increased by the inclusion of interstate business; the defendant company, if engaged exclusively in interstate business, would be subjected to the tax; and it could not obtain relief from the tax imposed on interstate business by discontinuing its intrastate business unless it also withdrew from its interstate commerce. [App. A, p. 21][6]

Instead of attempting to distinguish these controlling cases, petitioner places primary reliance on the following *dictum* from *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, 609-610 (1951), a case in which a net income tax was invalidated because imposed upon the privilege of engaging in interstate commerce:

> Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, *within reasonable limits,* may compute the amount of the charge by applying the tax rate

[6] The court also found that the tax violated the principle enunciated in numerous cases involving interstate carriers that "the only method of determining a valid privilege tax imposed by the statute is to segregate the net income of the intrastate business of the defendant in this State from the net income of its interstate business in this State and to subject only the net income derived from its purely intrastate business to such tax. *Ratterman* v. *Western Union Telegraph Company,* 127 U.S. 411" (App. A, p. 12).

> to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.

But the "reasonable limits" referred to by this Court were indicated clearly by the cases it cited, which are not analogous to this case. They involved activities such as manufacturing, retailing, wholesaling, and purchasing and selling which constituted "local incidents" which permitted the state to include interstate receipts from such business in the *measure* of a privilege tax on the local activity. They included: *Ford Motor Co.* v. *Beauchamp,* 308 U.S. 331 (1939), and *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113 (1920) (manufacturing); *International Harvester Co.* v. *Evatt,* 329 U.S. 416 (1947) (manufacturing and retailing); *Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942) (wholesaling); and *Department of Treasury* v. *Wood Preserving Corp.,* 313 U.S. 62 (1941) (purchasing and selling). In each of these cases the local activity was substantial and its value could be determined only by reference to the interstate revenue it generated. In the present case, the intrastate activity is not so substantial; it is separable from the interstate business, and the revenue generated is capable of separate and independent determination.

Other examples of the rule referred to in *Spector* are: substantial local activities such as printing, the *value* of which had to be determined by reference to interstate commerce (*Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1938); a tax other than a privilege tax on a *domestic* corporation (which as the creature of the taxing state, may be taxed more broadly for the use of a corporate franchise granted by the taxing state than in the case of a foreign corporation)

(*Central Greyhound Lines* v. *Mealey,* 334 U.S. 653 (1948));[7] a tax not based on receipts imposed on a local activity (*Memphis Natural Gas Co.* v. *Stone,* 335 U.S. 80 (1948), and *Atlantic Lumber Co.* v. *Commissioner,* 298 U.S. 553 (1936)); or a tax imposed upon a completely intrastate activity (*Interstate Oil Pipe Line Co.* v. *Stone,* 337 U.S. 662 (1949)). It is plain that by the general language from *Spector,* which petitioner quotes, this Court was in no sense sanctioning a tax which is expressly imposed on the privilege of engaging in interstate commerce, which is laid directly on income from interstate traffic, and which is measured by the volume of interstate business done.

The B&O activities in West Virginia of picking up and discharging interstate freight and passengers are activities incidental to the interstate business and do not afford a local basis for a privilege tax on that business. Nor is the tax saved by the fact that the incidence of the tax is upon apportioned net income rather than total net income. In *Railway Express Agency* v. *Virginia,* 347 U.S. 359, 367-368 (1954), this Court stated:

> But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. *It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax.*

[7] *Matson Nav. Co.* v. *State Bd. of Equalization,* 297 U.S. 441 (1936), extensively quoted in the petition is also inapposite. It involved only the right of the state which chartered the taxpayer to impose a tax upon the corporation's right to exist where the corporation was engaged in interstate as well as local commerce.

And as the Court said in *Spector Motor Service* v. *O'Connor, supra* at 609:

> The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state.

Petitioner does not allege that the holding of the West Virginia Supreme Court of Appeals conflicts with any decision of this Court concerning application of the kind of tax here involved to circumstances analogous to those of this case. Rather, petitioner's argument confuses the privilege tax in issue here with cases involving property or income taxes.[8] As Mr. Justice Frankfurter warned in *Freeman* v. *Hewit,* 329 U.S. 249, 252 (1946):

> Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.

Respondent submits that this case involves long standing fundamental rules and is not a situation where the interstate activity is sought to be taxed indirectly or is used as a measure of tax on an inseparable local activity, or in lieu of a permissible tax on property located within the State. The present case clearly involves a privilege tax on a separable interstate activity, in addition to other privilege and property taxes. It involves the same issue and rests upon the same reasoning as the numerous cases decided by

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[8] Reliance upon *Northwestern States Portland Cement Co.* v. *Minnesota, supra,* is misplaced. The tax involved there was a net income tax, not a privilege tax. Nor is *General Motors Corp.* v. *Washington, supra,* apposite. There the local sales activity was a local incident like retailing or manufacturing which sustained the tax.

this Court and relied on by the court below which invalidate state taxes falling directly upon the privilege of engaging in interstate commerce.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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